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IN THE

Supreme Court of the United States

Term, 1976

No. 75-1265

JOHN B. NAJANICK,

Petitioner,

versus

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNNSYLVANIA

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To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

By This Petition, John B. Najanick respectfully seeks a writ of certiorari to review the judgment and opinions in this case of the Superior Court of Pennsylvania at Pittsburgh, Pennsylvania.

I. Opinions of the Courts Below

The trial Court, the Court of Common Pleas of Allegheny County, Criminal Division, rendered an opinion upon Petitioner's Motion for a New Trial, a copy of which is appended hereto as Appendix "A". The Superior Court of Pennsylvania affirmed *per curiam* with one dissent. No opinions were filed by the Superior Court of Pennsylvania, and a copy

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of its Order, without opinion, is appended hereto as Appendix "B". The Order of the Supreme Court denying, without opinion, the Petition for Allowance of Appeal to the Supreme Court of Pennsylvania is appended hereto as Appendix "C" and its Order denying reconsideration of that Petition is appended hereto as Appendix "D". The judgment and order of the Superior Court of Pennsylvania is published and reported in 339 A.2d 815. The order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal and the Order denying the Petition for reconsideration of the Petition for Allowance of Appeal have not been published as of the date for filing of this Petition.

II. Jurisdictional Statement

The Superior Court of Pennsylvania rendered its original judgment and order on June 5, 1975. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on October 6, 1975 and the Supreme Court of Pennsylvania denied the Petition for reconsideration of the Petition for Allowance of Appeal on December 10, 1975. The original judgment and order of the Superior Court of Pennsylvania rendered on June 5, 1975 thereby became a final judgment which the highest Court of the Commonwealth of Pennsylvania refused to disturb.

The statutory provision believed to confer jurisdiction on this Honorable Court to review the final judgment rendered on June 5, 1975, by the Superior Court of Pennsylvania is 28 U.S.C. Section 1257(3). In the Courts below, Petitioner specially set up and claimed rights, privileges, and immunities guaranteed to him under the Fourth Amendment to the Constitution of the United States of America.

III. Question Presented for Review

Whether a warrantless search of the Petitioner, based solely upon information gained by officers from an informant unknown to them, was reasonable under the circumstances, where officers observed no unusual conduct on the part of the Petitioner and the observations of the officers prior to the search failed to confirm the informant's statement.

IV. Constitutional Provisions Which the Case Involves

The Constitutional provision involved in this case is the Fourth Amendment to the Constitution of the United States, reading:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V. Statement of the Case

This case arose out of the arrest and subsequent indictment of John B. Najanick on charges of unlawfully carrying a firearm without a license; possession of prohibited offensive weapons; possession of instruments of crime; and terroristic threats. The Petitioner entered a plea of Not Guilty and waived trial by jury and was found guilty on January 30, 1974 of unlawfully carrying of a firearm without a license, possession of prohibited offensive weapons, and terroristic threats. The Petitioner was sentenced to pay a fine of $500 and was released on three years probation with an alternate sentence of 23 months imprisonment.

A Motion for New Trial was filed in the trial court and denied in an opinion rendered March 29, 1974.

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The conviction was appealed to the Superior Court of Pennsylvania which affirmed the case *per curiam* without opinion on June 5, 1975. One justice dissented without opinion. Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was denied without opinion on October 6, 1975. Petitioner then filed a Petition for Reconsideration of his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was denied without opinion on December 10, 1975.

The relevant facts, which were testified to in the suppression hearing, are not in dispute. On October 19, 1973 at approximately 10:15 p.m. Pittsburgh police officers O'Brien and Korzen were on duty in a patrol car near a bar in the City of Pittsburgh when a person unknown to them approached them and told them that there was a man inside the bar waiving a gun around. The officers obtained a description of the alleged man and entered the bar. The officers looked around the crowded bar until they came across Petitioner who, it was testified, fit the description they were given. At the time, Petitioner was leaning over a juke box apparently looking at the songs on it. Officer O'Brien testified that there was no unusual activity in the bar and Petitioner was not seen doing anything out of the ordinary which would have warranted his attention had he not been given a description by the person outside the bar. Upon seeing Petitioner, the officers told him to keep his hands on the juke box he was leaning on, and they frisked him. They found a pistol which was not visible to them prior to the search.

After denial of the Motion to Suppress, it was testified that Petitioner was taken outside the bar and a more thorough search was conducted, resulting in the seizure of a knife from Petitioner's right front pants pocket. Officer O'Brien also testified that Petitioner threatened both officers verbally at the police station while in their custody.

Petitioner first raised the federal question sought to be reviewed in the Superior Court of Pennsylvania in his application to suppress evidence filed prior to his trial and his motion for new trial filed subsequent to his trial. The Petitioner first raised the federal question sought to be reviewed in the Supreme Court of Pennsylvania, which is the highest Court of the state, by filing his Petition for Allowance of Appeal, which was subsequently denied.

VI. Reasons for Granting the Writ

The Superior Court of Pennsylvania, supported by the Supreme Court of Pennsylvania's denial of Petition for Allowance of Appeal and denial of Petition for Reconsideration, has decided a federal constitutional question of substance involving Fourth Amendment rights in a way probably not in accord with applicable decisions of this Honorable Court.

VII. Argument

The Petitioner respectfully requests that this Honorable Court grant certiorari to review the action of the Superior Court of Pennsylvania in upholding the denial by the trial Court of the right of the Petitioner to be protected from unreasonable searches and seizures.

The trial Court permitted the admission into evidence of a gun, knife, and statements made by Petitioner, after a proper application to suppress such evidence was made by Petitioner, resulting in his conviction.

The only opinion filed in this case is that of the trial Court, which rests solely upon its interpretation of this Honorable Court's holding in *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L. Ed. 2d 612 (1972). In its opinion, the trial Court holds that although there was not probable cause to arrest and search the Petitioner without a warrant, the "Stop and

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Frisk" conducted by the officers was reasonable under the circumstances.

The officers did not see any unusual conduct on the part of the Defendant and the "stop and frisk" was justified solely on the basis of the information supplied by a person unknown to the officers. The information must carry enough indicia of reliability to justify the officer's forcible stop of suspect. *Adams v. Williams*, 407 U.S. at 147, L. Ed. at 617. The facts which justified the "stop and frisk" in *Adams vs. Williams, supra* are not present in this case. There, a police officer was alone in a patrol car in a high-crime district at 2:15 a.m. The informant was known to the officer and had supplied information in the past, and when the suspect was approached he disobeyed the officer's command to open the door and rolled down the window instead, an act that may have been a prelude to a shooting. In the case of Petitioner, there were two officers on patrol in mid-evening, the informant was unknown to them, the suspect was in a crowded bar, and no conduct on the part of the suspect was considered unusual by the officers involved.

The case of *Adams v. Williams, supra* is an extension of the exception created in *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S.Ct. 1868 (1968), to the requirement of a warrant to search an individual when there is not probable cause for arrest, under the Fourth Amendment to the Constitution. The purpose of this exception is to protect an officer from attack by a hostile suspect. *Adams v. Williams*, 407 U.S. at 146, L. Ed. at 617. Although the facts in *Adams* support the finding of justification of the limited protective search, the facts in Petitioner's case do not. Since there were many other people in the bar, the officers could have inquired around the bar to confirm the informer's statement before approaching the Petitioner. Since the informer was unknown to the officers, doing this might have provided the indicia of reliability required to justify the search.

In failing to reverse the conviction of the Petitioner and remand for a new trial, the Superior Court of Pennsylvania decided a Federal Constitutional question and erred in holding that the warrantless search of the Petitioner did not offend the protection against unreasonable searches and seizures guaranteed by the Fourth Amendment.

Conclusion

For the reasons stated, this Petition for writ of certiorari to the Superior Court of Pennsylvania should be granted.

Respectfully submitted,

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Counsel of Record,
For Petitioner.

Certificate

I hereby certify that a copy of the foregoing Petition for writ of certiorari has been served upon opposing counsel by serving same upon the office of Robert Colville, District Attorney of Allegheny County, County Court House, Pittsburgh, Pennsylvania, this 4th day of March, 1976.

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APPENDIX "A".

Opinion of Common Pleas Court of Allegheny County, Criminal Division.

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Criminal Division

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOHN B. NAJANICK.

No. 7498A December Term, 1973
1. Unlawful Carrying of Firearm Without a License
2. Prohibited Offensive Weapons
3. Possession of Instruments of Crime
4. Terroristic Threats

OPINION AND ORDER.

Clarke, *J.* Filed:

John B. Najanick, 34 year old male, resident of the City of Pittsburgh, was arrested without a warrant by Pittsburgh Police Officers on Friday, October 19, 1973, and charged with and subsequently indicted for (1) Unlawfully Carrying A Firearm Without A License; (2) Prohibited Offensive Weapons; (3) Possession of Instruments of Crime, and (4) Terroristic Threats.

Appendix "A"—Opinion of Common Pleas Court of Allegheny County, Criminal Division.

Defendant waived trial by jury and on January 30, 1974, after trial in open Court, was adjudged guilty of all counts except (3), the count of Possession of Instruments of Crime, being dismissed since it appeared to merge into or be included in count (2) Prohibited Offensive Weapons. Defendant was sentenced immediately after verdict. Defendant was ordered to pay the sum of $500.00 for the use of the County and costs of prosecution, and he was released on three (3) years probation. An alternate sentence of 11 ½ to 23 months imprisonment was announced.

Post-trial Motions for New Trial and In Arrest of Judgment were timely filed alleging:

(1) Error in denying Motion to Suppress;
(2) Verdict contrary to evidence;
(3) Verdict contrary to weight of the evidence;
(4) Verdict contrary to law.

No brief was submitted by either side, and at argument, the only ground urged by defendant was the warrantless search and arrest. After argument, the post-trial motions were denied on March 29, 1974.

DISCUSSION.

The facts of the case were brought out in testimony of James O'Brien, Pittsburgh Police Officer, during a pre-trial hearing on a Motion to Suppress a .32 Caliber Smith and Wessan revolver. The ground alleged in the Suppression Motion was that the search of defendant was unlawful in that it was "conducted without a warrant for an alleged misdemeanor not committed in the officer's presence."

Officer O'Brien's testimony at the suppression hearing was, in substance, that on October 19, 1973, at about 10:15 P.M., at

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Spring Garden and Madison Avenues, North Side, Pittsburgh, he and Officer Korzen, his partner, were in their police car and an unidentified male person approached them and told them "a man was inside a bar at Spring Garden and Madison Avenue with a gun . . . waving it around." The man gave the officers a description. The officers instructed the informant/complainant "to wait there" and they went immediately into the bar, fifty or sixty feet away. The bar was crowded but they "came across a person that fit the description," approached him and told him to "keep his hands on the juke box he was leaning on, and we frisked him." Officer Korzen found the gun "stuck in his pants." The officers had neither an arrest nor a search warrant.

On cross-examination, O'Brien said he did not know the person who gave him the information outside the bar, that defendant nor anyone else in the bar was doing anything "unusual" or out of the ordinary; that defendant "appeared to be looking at the songs on the juke box."

Defendant argued that the officers had no basis for believing the man who gave them information was reliable and that they had no probable cause to proceed as they did.

The Court denied the suppression motion. The Commonwealth, without objection, moved to incorporate the police officer's suppression testimony into the Commonwealth's case in chief, and then had the weapon introduced in evidence, the officer reporting that it was loaded with five live rounds. The Commonwealth also brought out that a more thorough search of defendant, outside the bar, before placing him in the wagon, produced a knife with a three inch blade from defendant's right front trouser pocket, and that at the police station, during the booking

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process, defendant said to the police officers, "I'm going to get my gun back and I'm going to come looking for you and I'm going to blow you both away. I'm going to blow you away."

The Court is of the opinion that the police officers acted reasonably under the circumstances and did not violate defendant's constitutional rights and that after frisking him and finding the revolver they were obliged to arrest him and bring charges. The circumstances of this case are comparable to those of the case of *Adams v. Williams*, 407 U.S. 143 (1972) where a police officer in a patrol car was told that an individual seated in a nearby car was carrying narcotics and had a gun at his waist. Investigating the informer's report, the officer tapped on the car window and asked the occupant to open the door, but the window was rolled down instead, whereupon the officer reached into the car and removed from the occupant's waist band a loaded revolver which had not been visible from outside the car. The officer arrested the occupant for unlawful possession of the revolver, and in a search conducted after assisting officers arrived found substantial quantities of narcotics on his person, and a machete and a second revolver in the car. The claim in that case was as here, that since the officer had neither probable cause to arrest nor any other sufficient cause for reaching into the defendant's waist band, that the evidence seized was improperly admitted at defendant *Williams'* trial. The Second Circuit Court of Appeals granted defendant *Williams* relief in a *habeas corpus* proceeding but the U. S. Supreme Court reversed the Circuit Court.

This Court is of the opinion that Officers O'Brien and Korzen carried out their duties properly when being told of

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someone with a gun in a nearby bar, and that the description they had enabled them to identify Najanick out of all the persons in a crowded bar and their "frisk" of him was reasonable and proper. The complainant or informant, whatever he may be called, quite reasonably upon leaving the bar and seeing the officers nearby, reported the dangerous conduct of a "man in a bar waving a gun." The officers reacted immediately and appropriately to investigate this bizarre and potentially dangerous reported behavior in a legitimate and reasonable performance of their duties as police officers.

The *Williams* case, *supra,* was cited with approval by the Superior Court in *Com. v. DeJesus,* 226 Pa. Super. Ct. 79 (1973), and while both cases involve searches of persons who were occupants of automobiles, the language of the Superior Court seems appropriately dispositive of the circumstances the officers were confronted with in the instant case:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape." (citing *Adams v. Williams, supra), Com. v. DeJesus, supra,* at P. 83.

Officers O'Brien and Korzen did not shurg off the report of a man with a gun in a nearby bar and their frisk of the person of Najanick was justified; they acted as reasonably prudent officers in the circumstances with due regard for their own safety and that of others in investigating this report.

The statement of defendant to the officers at the police station about "blowing them away" constituted a threat to commit a crime of violence with intent to terrorize the officers, and therefore the Court will deny the Motion for New Trial and Motion In Arrest of Judgment and enter the following:

Appendix "B"—Opinion of Superior Court Affirming Judgment of Trial Court.

ORDER.

AND NOW, this 29th day of March, 1974, after argument, defendant's post-trial Motion For A New Trial will be refused and Motion In Arrest of Judgment denied and defendant is ordered to appear in Courtroom No. 7, Third Floor, Courthouse, Pittsburgh, Pennsylvania, 15219, at 1:30 P.M. on the 10th day of April, 1974, for execution of sentence which had been suspended pending disposition of these motions.

By the Court

CLARKE, *J.*,
Clarke, *J.*

APPENDIX "B".

Opinion of Superior Court affirming Judgment of Trial Court.

Judgment of sentence affirmed, and the defendant is directed to appear in the Court below at such time as he may be there called, and that he be by that Court committed until he has complied with the sentence, or any part thereof where has not been performed at the time the appeal was made a *supersedeas.*

HOFFMAN, *J.*, dissents. *PER CURIAM*

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APPENDIX "C".

Order of Supreme Court of Pennsylvania denying Petition for Allowance of Appeal.

"October 6, 1975
Petition denied.
Per Curiam"

APPENDIX "D".

Order of Supreme Court denying Petition for Reconsideration.

"December 10, 1975
Petition denied.
PER CURIAM"